SUPREME COURT, U. S.
FILED
DEC 6 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners,*

VS.

THE UNITED STATES, *Respondent.*

PETITION FOR REHEARING

FRANCIS X. DRISCOLL
1501 N. Broadway
Walnut Creek, California 94596
SIEGFRIED HESSE
1630 San Pablo Avenue
Oakland, California 94612
Attorneys for Petitioners

ROBERT P. BRORBY
1630 San Pablo Avenue
Oakland, California 94612
CRAIG Z. RANDALL
1501 N. Broadway
Walnut Creek, California 94596
FRED C. DODGE
EDWARD O. REYES
JULIUS KAHN III
THOMAS J. TITMUS
1630 San Pablo Avenue
Oakland, California 94612
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO - CA 94105

Subject Index

Page

1. The decision below misapplied the doctrine of stare decisis to petitioners' unlitigated constitutional claims in direct conflict with a decision of the Ninth Circuit 1
2. Because of the exclusive jurisdiction of the Court of Claims the erroneous decision below will bar further consideration of the unresolved merits of the claims presented herein unless this court exercises its power of supervision 4
3. When the Court of Claims acts as a trial court, the denial of any review deprives petitioners equal protection of the laws 5

Conclusion 7

Table of Authorities Cited

Cases	Pages
Akerson v. United States, 175 Ct.Cl. 551 (1966)	2
Andrews v. United States, 175 Ct.Cl. 561 (1966)	2, 3, 7
Baker v. Carr, 369 U.S. 186 (1962)	3
Griffin v. Illinois, 351 U.S. 12 (1956)	6
Hansberry v. Lee, 311 U.S. 32 (1940)	7
Luckenbach S.S. Co. v. United States, 272 U.S. 533 (1926)	6
McKane v. Durston, 153 U.S. 684 (1894)	6
Menglekoch v. Industrial Welfare Comm'n, 442 F.2d 1119 (1971)	3, 4
Powell v. McCormack, 395 U.S. 486 (1969)	2

Pages

Rinaldi v. Yeager, 384 U.S. 305 (1966) 6

Schriber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47 (1938) 4, 5

The "Francis Wright", 105 U.S. 381 (1882) 6
Truax v. Corrigan, 257 U.S. 312 (1921) 7

United States v. Mitchell, 271 U.S. 9 (1926) 2
United States v. Tucker Truck Lines, 344 U.S. 33 (1952) 2
United States v. Tyler, 105 U.S. 244 (1882) 2

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 6
Webster v. Fall, 266 U.S. 507 (1925) 2

Statutes

28 U.S.C.:
Section 1255 ..... 4, 6
Section 1291 6
Section 1346(a)(2) 5
Section 1491 ..... 4, 5

Texts

Navy Times, Oct. 24, 1973, pp. 1, col. 3, 47, col. 6 5

Stern & Gressman, Supreme Court Practice, 189 (4th ed. 1969) 5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered November 12, 1973, and (2) granting the petition. As grounds for this motion, petitioners state the following:

1. The decision below misapplied the doctrine of stare decisis to petitioners' unlitigated constitutional claims in direct conflict with a decision of the Ninth Circuit.

Petitioners presented herein seven constitutional claims relating to their retired pay. Five of these claims had never before been presented to any court.

See Pet. 10-11.[1] The Court of Claims, after noting some of these new claims, nevertheless dismissed the petition solely on the ground of stare decisis! This misapplication of the doctrine of res judicata in the guise of stare decisis to the unlitigated claims was clearly erroneous. E.g., *Webster v. Fall*, 266 U.S. 507, 511 (1925); *United States v. Mitchell*, 271 U.S. 9, 14 (1926); *United States v. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952). See also *Powell v. McCormack*, 395 U.S. 486, 497-99 (1969).[2]

---

[1]Petitioners' claims are:

First, if their retired pay is deferred compensation for past service, petitioners sought:

(a) Restoration of the right to recomputation or just compensation for the taking of that right. Petition 23-29 (First and Second Causes of Action); or,

(b) Recomputation on reaching age 62, on the grounds that their retired pay (i) could not rationally be considered current standby pay after each reaches the mandatory age of retirement; and (ii) is not standby pay before reaching that age, but a second career income supplement. Petition 29-33 (Third and Fourth Causes of Action).

Second, if their "retired" pay is for current reduced service, petitioners sought:

(c) Equal pay for equal standby service. Petition 33-35 (Fifth and Sixth Causes of Action); and/or,

(d) The return of the contributions they made towards the funding of their retired pay, plus interest. Petition 36-37 (Seventh Cause of Action).

Only those claims in subparagraph (a) were presented in *Akerson v. United States*, 175 Ct.Cl. 551 (1966), and *Andrews v. United States*, 175 Ct.Cl. 561 (1966), relied on by the court below.

[2]The erroneous nature of the ruling below is underscored by the fact that the Government did not seek to uphold the dismissal on the ground of stare decisis. Instead, it relied on a new contention not presented to the Court of Claims. See M10 2-3. As noted in Petitioners' Reply Memorandum, the Government's new position should entitle petitioners to a refund, in whole or in part, of their retirement contributions. PRM 6. That conclusion also follows if this Court's decision in *United States v. Tyler*, 105 U.S. 244 (1882), which has never been expressly overruled, is still operative.

The court justified its ruling as follows:

> "While some of the . . . contentions of the plaintiffs may be couched in somewhat different language to those that were urged in *Akerson* and *Andrews, the underlying and controlling issue* in those cases and in the instant case *is whether or not the 1958 and 1963 Acts* described above *deprived plaintiffs of their property without due process of law in violation of the fifth amendment.* We decided this question adversely to the plaintiffs in those cases. The plaintiffs argue that even if this is true, our decisions in those cases were wrong and we should reconsider them. We think our decisions in those cases were correct and *we follow them under the stare decisis rule. . . .*" (Emphasis added.)
>
> (Pet. 7a.)

This reasoning is fallacious,[3] and in direct conflict with the Ninth Circuit's decision in *Menglekoch v. Industrial Welfare Comm'n,* 442 F.2d 1119, 1124-25 (1971), which held the unsuccessful assertion that a statute violated a specific constitutional clause on one theory does not bar a subsequent challenge of the same statute on a different theory even though based on the same clause. See also *Baker v. Carr,* 369 U.S. 186 (1962).

---

[3]In the first place, three of petitioners' seven causes of action, including their claim for a refund of their retirement contributions if they have no retirement rights, are founded on the taking rather than the due process clause of the Fifth Amendment. Secondly, the due process clause incorporates a number of different constitutional guarantees. Claimants in *Andrews v. United States,* 175 Ct. Cl. 561 (1966), sought vindication of their contractual rights under that clause. Petitioners herein also sought equal protection of the laws, which is likewise guaranteed by that clause.

If the decision below is allowed to stand, and is followed, it will severely hamper the growth of constitutional doctrine. Accordingly, this Court should grant a rehearing to resolve the conflict between the decision below and *Menglekoch*.

2. Because of the exclusive jurisdiction of the Court of Claims, the erroneous decision below will bar further consideration of the unresolved merits of the claims presented herein unless this Court exercises its power of supervision.

Petitioners' military retirement rights have been substantially abridged since 1963. It is improbable, therefore, that the merits of the claims presented herein (left unresolved by the erroneous application of stare decisis below) can be litigated in any other forum by others similarly situated. Similar claims will most likely exceed $10,000,[4] and the Court of Claims has exclusive jurisdiction over such claims. 28 U.S.C. §1491. Despite its erroneous nature, the decision below will be given stare decisis effect by the Court of Claims. Unless this Court corrects that decision, therefore, its error will be indefinitely perpetuated with little probability of a conflicting decision in one of the circuits. See *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (1938).

Moreover, the Court of Claims is unique in being the only court of first impression of the United States from which there is no right of appeal.[5] See 28 U.S.C. §1255. In any other federal trial court an

[4]See Exhibit 5 of the Petition below for examples of the magnitude of the claims.

[5]Except the rare cases in which this Court exercises its original jurisdiction.

erroneous ruling on a dispositive motion which denies any consideration of the merits of the claims presented is subject to correction on appeal.[6] This fact, combined with the court's exclusive jurisdiction, calls for closer scrutiny by this Court, and suggests a special need for correction of clearly erroneous decisions. Stern & Gressman, SUPREME COURT PRACTICE 189 (4th ed. 1969).

The effect of the denial of a rehearing will be not only to condone a clearly erroneous decision, but will also permanently bar consideration of the merits of the claims left unresolved herein.[7] In such circumstances, the petition for rehearing should be granted. *Schriber-Schroth Co. v. Cleveland Trust Co., supra.*

3. When the Court of Claims acts as a trial court, the denial of any review deprives petitioners equal protection of the laws.

Petitioners were compelled to file their claims in the Court of Claims unless they limited them to $10,000. 28 U.S.C. §§1346(a)(2), 1491. They were,

---

[6]Normally, claims filed in the Court of Claims are initially heard by a commissioner, who prepares findings of fact and conclusions of law on the merits.. Ct. Cl. R. 34(h). Exceptions (with supporting briefs) may be filed to his findings and conclusions, in which case the Court of Claims, acting more as an appellate court, affirms, overrules, or modifies the commissioner. Ct. Cl. R. 134, 136. But dispositive motions are normally heard by the court alone. Ct. Cl. R. 146(a). In such cases, as here, there are no findings of fact and conclusions of law on the merits of the claims presented. See Ct. Cl. R. 147(a).

[7]Since filing the petition for certiorari (see Pet. 29a-34a), Congress again made clear that there is no reasonable expectation for legislative relief when it struck a Senate provision for one time recomputation from the Defense Appropriation Bill. See *Navy Times*, October 24, 1973, pp. 1, col. 3, 47, col. 6.

therefore, effectively denied any right of an appeal.[8] 28 U.S.C. 1255. The jurisdictional grants of the Tucker Act thus discriminate procedurally against claimants with substantial claims against the Government. Compare 28 U.S.C. §1291.

It may be rational to require substantial claims to be presented in Washington, D.C., to a specialist court of seven judges, rather than in any district to a single, generalist judge. But the rationality of denying larger claimants a right of appeal which smaller claimants enjoy does not follow, particularly when, as here, the Court of Claims acts as a trial rather than as a reviewing court.

Petitioners are aware of the statements and holdings that there is no due process right to an appeal. E.g., *Luckenbach S.S. Co. v. United States,* 272 U.S. 533, 536 (1926) (Court of Claims); *McKane v. Durston,* 153 U.S. 684, 687 (1894) (state criminal proceedings); *The "Francis Wright",* 105 U.S. 381, 386 (1882) (Supreme Court appellate jurisdiction). But there is an equal protection right to an appeal. *Griffin v. Illinois,* 351 U.S. 12 (1956); *Rinaldi v. Yeager,* 384 U.S. 305 (1966). And there is no rational basis for denying claimants an appeal based on the amount of their claims. Those with claims against the Government in excess of $10,000 should also be entitled to an independent review to insure a fair trial.[9]

---

[8]For example, an Army colonel or Navy captain who retired before 1958 with thirty years service would be required to waive more than two-thirds of his claim. See Petition below, Exhibit 5-10.

[9]There is a due process right to *fair* trial on the merits. *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). Whatever the ultimate

Unless this Court grants review, therefore, petitioners will be denied equal protection of the laws as guaranteed by the due process clause of the Fifth Amendment. Accordingly, this petition for rehearing should be granted.

CONCLUSION

For the reasons set forth above, as well as those in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully, submitted,
FRANCIS X. DRISCOLL
SIEGFRIED HESSE
Attorneys for Petitioners.

ROBERT P. BRORBY
CRAIG Z. RANDALL
FRED C. DODGE
EDWARD O. REYES
JULIUS KAHN III
THOMAS J. TITMUS
Of Counsel.

---

resolution of the merits of their claims, petitioners were entitled to equal treatment with other litigants. *Truax v. Corrigan*, 257 U.S. 312, 332, 334 (1921); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). They were, however, arbitrarily denied that right. There was no basis in fact for the Court of Claims' reliance on stare decisis. Nevertheless, that court deliberately dismissed petitioners' claims without consideration of their merits, a right it accords all other claimants before it. See, e.g., *Andrews v. United States*, *supra*, n. 3.

Certificate of Counsel

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Francis X. Driscoll
Counsel for Petitioners